

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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JERALD REY COSTA, JR.,

v.

**Petitioner,**

Case No. 3:16-cv-00705-HDM-CLB

## ORDER

ISIDRO BACA, *et al.*,

## Respondents.

12 This is a federal habeas proceeding under 28 U.S.C. § 2254 brought by Jerald  
13 Rey Costa, Jr., a Nevada prisoner. Respondents have filed a motion to dismiss Costa's  
14 habeas petition arguing that Ground 1 is not cognizable as a stand-alone claim and that  
15 Grounds 2(1-3) and 3 are not cognizable because they allege constitutional violations  
16 that occurred prior to Costa's guilty plea. ECF No. 22. For reasons that follow, the  
17 motion to dismiss is granted, in part, and denied, in part.

## I. PROCEDURAL BACKGROUND

In December 2010, Costa was charged with murder with use of a firearm based on allegation that he shot Anthony Pulice with a handgun in a bar in Sparks, Nevada. After Costa entered a guilty plea to first-degree murder, the Second Judicial District for Nevada (Washoe County) entered a judgment of conviction in August 2011, sentencing him to life with the possibility of parole after 20 years. Costa appealed. In May 2012, the Nevada Supreme Court affirmed the judgment.

In January 2014, Costa filed a counseled supplemental state petition for writ of habeas corpus, seeking post-conviction relief. After holding an evidentiary hearing, the

1 state district court held denied the petition. Costa appealed. In November 2016, the  
2 Nevada Supreme Court affirmed the denial of Costa's petition.

3 In late 2016, Costa submitted his original federal habeas petition. This Court  
4 stayed this matter while Costa's state proceedings were ongoing. During the stay, Costa  
5 filed a pro per state habeas petition, a motion to vacate his judgment of conviction, a  
6 motion for a new sentencing hearing and a motion to re-consider sentence, all of which  
7 were denied.

8 In May 2022, this court reopened this case and, soon thereafter, Costa filed the  
9 amended petition that is the subject of respondents' motion to dismiss.

10 **II. DISCUSSION**

11 A. Ground 1

12 In Ground 1, Costa alleges that he is "actually innocent" of first-degree murder  
13 because his alcoholic blackout and mental impairments prevented him from forming the  
14 requisite intent for first-degree murder and because Pulice died from pneumonia, not  
15 from being shot. Respondents argue that the ground should be dismissed because  
16 claims of actual innocence are not cognizable as a stand-alone claim on federal habeas  
17 review.

18 The Supreme Court has "not resolved whether a prisoner may be entitled to  
19 habeas relief based on a freestanding claim of actual innocence." *McQuiggin v. Perkins*,  
20 569 U.S. 383, 392 (2013) (citing *Herrera v. Collins*, 506 U.S. 390, 404-405 (1993)).  
21 Thus, it is questionable whether Ground 1 is cognizable on habeas review as  
22 presented. However, it is not necessary for the court to resolve that question because  
23 Ground 1 fails as an actual innocence claim.

24 To be credible, an actual innocence claim "requires petitioner to support his  
25 allegations of constitutional error with new reliable evidence—whether it be exculpatory  
26 scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that  
27 was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Petitioner must

1 show that, in light of all available evidence, it is more likely than not that no reasonable  
2 juror would convict him of the relevant crime. See *House v. Bell*, 547 U.S. 518, 536-37  
3 (2006).

4 In this case, there was no trial because Costa entered a guilty plea. Indeed,  
5 Costa's claim of actual innocence is fully inconsistent with his plea of guilty, which is  
6 entitled to a strong presumption of truth. See *Muth v. Fondren*, 676 F.3d 815, 821-22  
7 (9th Cir. 2012) (finding that petitioner was not entitled to application of the § 2255  
8 escape hatch where his claim of actual innocence was contradicted by his guilty plea);  
9 see also *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("[T]he representations of the  
10 defendant [at a plea hearing] ... constitute a formidable barrier in any subsequent  
11 collateral proceedings. Solemn declarations in open court carry a strong presumption of  
12 verity."); *United States v. Ross*, 511 F.3d 1233, 1236 (9th Cir. 2008) ("Statements made  
13 by a defendant during a guilty plea hearing carry a strong presumption of veracity in  
14 subsequent proceedings attacking the plea."). The Supreme Court has recognized the  
15 possibility of actual innocence in the guilty plea context, but in only in a case where  
16 there was a retroactive intervening change in the law. *Bousley v. United States*, 523  
17 U.S. 614, 623-24 (1998). In one case, the Ninth Circuit assumed that a claim of actual  
18 innocence was available to a petitioner who plead guilty but declined to resolve the  
19 issue because the petitioner failed to meet the *Schlup* standard. See *Smith v. Baldwin*,  
20 510 F.3d 1127, 1140 n.9 (9th Cir. 2007).

21 In any case, Costas has not presented, or even identified, new reliable evidence  
22 demonstrating that he is actually innocent of first-degree murder. Any evidence that  
23 might support his broad claims regarding lack of intent and proximate cause was  
24 presumably available at the time he entered his guilty plea. Costa makes no claim to the  
25 contrary. If that is the case, he may have a cognizable claim based on ineffective  
26 assistance of counsel, but not based on actual innocence. Accordingly, Ground 1 is  
27 dismissed.

B. Grounds 2(1-3) and 3

In Grounds 2(1-3) and Ground 3, Costa alleges that he was deprived of effective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments. Respondents argue that these grounds should be dismissed because they are premised on alleged deprivations of Costa's constitutional rights that occurred prior to the entry of his guilty plea. In *Tollett v. Henderson*, the United States Supreme Court held that "when a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." 411 U.S. 258, 267 (1973). A petitioner may only attack the voluntary and intelligent nature of the guilty plea. *Id.* An exception to this general rule is "that a habeas petitioner may 'attack the voluntary and intelligent character of the guilty plea' based on pre-plea ineffective assistance of counsel 'by showing that the advice he received from counsel was not within the' 'range of competence demanded of attorneys in criminal cases.'" *Mahrt v. Beard*, 849 F.3d 1164, 1170 (9th Cir. 2017) (citing *Tollett*, 411 U.S. at 267–69). The court in *Mahrt* clarified that this exception to the *Tollett* bar is not limited to incompetent advice from counsel and extends to instances in which "the action, or inaction, of counsel prevent[ed] petitioner from making an informed choice whether to plead." *Id.*

In Grounds 2(1-3) and 3, Costa claims that his trial counsel, Jennifer Lunt, performed below the constitutional standard for two reasons.<sup>1</sup> First, he alleges that Lunt failed to investigate whether he lacked the requisite intent to commit first-degree murder because, at the time of the shooting, he was experiencing an alcoholic blackout and had

<sup>1</sup> While respondents divide Grounds 2(1-3) and 3 into four separate claims (ECF No. 22 at 2), Ground 2(3) and Ground 3 merely supplement the allegations made in Ground 2(1) and Ground 2(2).

not been taking his medication for other mental health conditions. Second, he alleges Lunt failed to investigate whether Pulice had pulled a knife on him before he shot Pulice.

If Lunt failed to investigate viable defenses, as Costa claims, such failure could have adversely impacted the advice Lunt gave Costa and Costa's decision to enter a guilty plea. In other words, it could have prevented Costa "from making an informed choice whether to plead." *Mahrt*, 849 F.3d at 1170. Consequently, the court concludes that the two grounds for relief alleged in Grounds 2(1-3) and 3 are not barred under *Tollett*. See *id.*, see also *Hill v. Lockhart*, 474 U.S. 52, 59 ((1985)) (recognizing that counsel's failure to investigate can prejudice defendant by impacting counsel's recommendation as to a guilty plea).

**IT IS THEREFORE ORDERED** that respondents' motion to dismiss (ECF No. 22) is GRANTED, in part, and DENIED, in part. Ground 1 of the amended petition for a writ of habeas corpus (ECF No. 14) is dismissed.

**IT IS FURTHER ORDERED** that respondents have 60 days from the date this order is entered to file an answer responding to the remaining claims in the amended petition. With their answer, respondents shall supplement the record with a copy of the transcript of the preliminary hearing conducted on July 8, 2010, in Case No. SJC 10-1108 (Sparks Justice Court).<sup>2</sup>

**IT IS FURTHER ORDERED** that petitioner's motion for extension of time (ECF No. 24) is GRANTED *nunc pro tunc* to November 9, 2022.

DATED this 28th day of March , 2023.

Howard D McKibbin

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**UNITED STATES DISTRICT JUDGE**

<sup>2</sup> Prior to Pulice’s death, the Sparks Justice Court held a preliminary hearing on a charge of attempted murder. When the State subsequently brought a murder charge, the Sparks Justice Court held another preliminary hearing at which it took judicial notice of the prior hearing and heard testimony limited to the cause of Pulice’s death. See ECF No. 19-7 at 5-6. The current record contains a transcript of the second hearing (ECF No. 19-7), but not the first. Accordingly, the court directs respondents to provide a transcript of the first hearing if it is available.